***United States Court of Appeals***

***for the Second Circuit***


# BRIEF FOR APPELLEE

Original with affidavit of Mailing

# 76-6074

*To be argued by*
J. CHRISTOPHER JENSEN

# United States Court of Appeals

## FOR THE SECOND CIRCUIT

**Docket No. 76-6074**

B P/S

FELIX ROJAS GONZALEZ,
*Appellant,*

*—against—*

SECRETARY OF HEALTH, EDUCATION AND WELFARE OF THE UNITED STATES,
*Appellee.*



ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

## BRIEF AND APPENDIX FOR THE APPELLEE

DAVID G. TRAGER,
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## TABLE OF CONTENTS



### TABLE OF CASES AND AUTHORITIES

*Statutes Cited*



*Other Material*

# United States Court of Appeals

## FOR THE SECOND CIRCUIT

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FELIX ROJAS GONZALEZ,

*Appellant,*

*—against—*

SECRETARY OF HEALTH, EDUCATION AND WELFARE OF THE UNITED STATES,

*Appellee.*

## BRIEF FOR THE APPELLEE

### Preliminary Statement

This is an appeal from a final judgment of the United States District Court for the Eastern District of New York (Bruchhausen, *J.*) affirming the denial of Social Security disability insurance benefits to the appellant.

The opinion below has not been officially reported. A copy of that opinion appears in the appendix.

### Statement of the Case

#### A. Facts

Plaintiff, who had two years of education in Puerto Rico, alleged he became unable to work on June 9, 1971, at age 50, because of two broken bones in his back (Tr.

61, 74, 130, 145, 151).[1] He had worked for about 12 years on sugar cane and tobacco farms in Puerto Rico before coming to the United States in 1956; since then, he has worked as a mattress cutter, a sander and polisher in a furniture factory, and as a machine operator packaging mattress stuffing and garments (Tr. 62-65, 147, 153, 158-159, 165-166). The Secretary found that plaintiff had no orthopedic, neurological, mental or emotional impairment of sufficient severity that had prevented gainful activity for any continuous period of at least 12 months (Tr. 5-8).

The medical evidence is discussed in the body of the brief and is therefore not summarized here.

## B. Proceedings Below

Plaintiff's application for a period of disability insurance benefits was filed on September 9, 1971 (Tr. 130-133). The application was denied initially (Tr. 136-137) and on reconsideration (Tr. 141-142) by the Bureau of Disability Insurance of the Social Security Administration, after the New York State Agency, upon evaluation of the evidence by a physician and a disability examiner, had found that plaintiff was not under a disability (Tr. 134-135, 139-140). The administrative law judge, before whom plaintiff, his attorney, an interpreter and a vocational expert appeared, considered the case *de novo*, and on October 30, 1973, found that plaintiff was not under a disability (Tr. 16-24). On its own motion to review the administrative law judge's decision and after receipt of additional evidence and consideration of the entire record, the Appeals Council prepared a supplemental decision

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[1] Page references in parenthesis refer to the transcript of record.

on March 28, 1975 affirming the Administrative Law Judge's decision (Tr. 5-8). Hence, the decision of the Appeals Council became the final decision of the Secretary. Having exhausted all administrative remedies, the appellant then filed an action in the United States District Court for the Eastern District of New York on April 17, 1975. On February 13, 1976, both parties moved for judgment on the pleadings. On February 18, 1976, the Court below (Bruchhausen, *J.*) granted the defendant's motion. Plaintiff-appellant now appeals to this Court from every part of the decision below.

## ARGUMENT

### POINT I

**The decision of the Secretary that appellant was not under a disability is supported by substantial evidence and should be affirmed.**

On this appeal, the appellant argues that the denial of his disability benefits was not supported by substantial evidence, because the administrative law judge allegedly did not consider the appellant's pain or the combined effect of the appellant's impairments in making his determination. The appellant further maintains that there is no substantial evidence that there is work available in the national economy for a person with his limitations. On these grounds, the appellant urges this Court to reverse the judgment of the lower court.[2]

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[2] In the alternative, the appellant requests that the case be remanded for the taking of additional evidence. We have treated this claim in Point II, *infra*.

In this argument, we submit that there is more than substantial evidence to support the Secretary's finding, that the Secretary did consider both the appellant's pain and the combined effect of the appellant's impairment in making his findings, and that there is substantial evidence in the record indicating that work exists in the national economy for a person of appellant's capacity.

Under 42 U.S.C. § 423(d)(5), an individual ". . . . shall not be considered to be under a disability unless he furnishes such medical and other evidence of the existence thereof as the Secretary may require." The ultimate burden of persuasion therefore rests upon the appellant. *Franklin* v. *Secretary of HEW*, 393 F.2d 640 (2d Cir. 1967). In the present case, the administrative law judge found that the appellant was not under a disability, basing his decision on ". . . . an analysis of all the substantive and credible evidence of record . . ." (Tr. 23). This finding is conclusive upon the reviewing court if supported by substantial evidence. 42 U.S.C. § 405(g). The United States Supreme Court has defined "substantial evidence" as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson* v. *Perales*, 402 U.S. 389, 401 (1971). Thus, if the administrative finding is reasonable, the reviewing court should not substitute its judgment for that of the Secretary. *Louis* v. *Celebrezze*, 368 F.2d 640 (4th Cir. 1966).

Although recent cases in this Court have held that the Social Security Act is to be "broadly construed and liberally applied," *Gold* v. *Secretary of HEW*, 463 F.2d 38, 41 (2d Cir. 1972); *Cutler* v. *Weinberger*, 516 F.2d 1282 (2d Cir. 1975); it should be noted that these cases involved claimants who were not represented by counsel at the hearing. When a claimant appears at a hearing *pro se*, this Court has required the administrative law judge to assume the role of advocate for the claimant and

to closely scrutinize all of the relevant facts. *Gold* v. *Secretary of HEW*, *supra*.

In the instant case, however, the appellant was represented by counsel at all times during the hearing (Tr. 14). Since the appellant was at no disadvantage, the more limited issue on this appeal is whether the Secretary was reasonable in finding that appellant did not meet the statutory burden of proof. Here the administrative law judge carefully considered both the combined effect of the appellant's impairments, and the subjective pain he allegedly suffered, and concluded that there is substantial work available in the national economy for a person with appellant's limitations. This conclusion is reasonable, and is supported by "substantial evidence" of record.

## A. The administrative law judge considered appellant's pain in making his determination

This Court has said that pain alone may establish a disability. *Ber* v. *Celebrezze*, 332 F.2d 293 (2d Cir. 1964). However, such pain must be of a "severe and intractable nature." *Sanders* v. *Weinberger*, 1A CCH Unempl. Ins. Rep. Fed., ¶ 14,503 (E.D.N.Y. 1974).

The appellant contends that his pain was not considered by the administrative law judge at the hearing. The record does not substantiate this contention. The judge specifically stated that he was basing his conclusion on ". . . all the substantive and credible evidence of record . . ." (Tr. 23). The judge's very opinion notes that "claimant alleges constant back pain and pain in the left arm since the date of the accident." (Tr. 20). He also noted that claimant ". . . states he cannot sit or stand for long periods and feels relief only when supine." (Tr. 20). During the hearing, the judge personally sought to

elicit statements from Mr. Gonzalez concerning his pain. (Tr. 82). It appears then, that appellant's real objection is *not* that the judge failed to *consider* pain, but that he failed to believe that pain existed in such amount as to preclude substantial gainful activity.

While a claimant's pain is a proper consideration in determining disability, " . . . it does not follow that every claim of disabling pain must be accepted by the hearing examiner." *Scherillo* v. *Richardson*, 1 CCH Unempl. Ins. Rep., Fed., ¶ 16,808 (E.D.N.Y. 1972) at p. 2499-41. The statute specifically requires the claimant to furnish proof of his disability, 42 U.S.C. § 423(d)(5), because Congress was concerned with the unexpectedly large number of claims that were being paid. 1967 U.S. Code Cong. & Adm. News 2880. Consistent with this concern, the courts in this circuit have not required the hearing examiner to accept at face value a claimant's subjective testimony as to the amount of pain he suffers. *Mann* v. *Richardson*, 323 F. Supp. 175 (S.D.N.Y. 1971); *Selig* v. *Richardson*, 379 F. Supp. 594 (E.D.N.Y. 1974). *See also*, *Peterson* v. *Gardner*, 391 F.2d 208 (2d Cir. 1968).

In *Sanders* v. *Weinberger*, *supra*, the Court, (Neaher, *J.*), noted:

> "The credibility of the witnesses and the weight to be given to evidence are matters to be determined by the Secretary, . . . and conflicts in evidence are also matters to be resolved by him."

*Sanders* v. *Weinberger*, *supra*, at 2007 (citations omitted).

The appellant, however, claims that the administrative law judge "specifically" refused to make any finding on the issue of appellant's credibility. In reality, the

judge did not refuse to make such a finding, but rather noted that the issue of credibility was not "so vital" in this case as in others, since the appellant had made certain admissions to Dr. Nelson, an orthopedic consultant, concerning his ability to walk, stand, sit and use public transportation (Tr. 23). Appellant further maintains that it is not clear whether these were really admissions or were merely assumptions by Dr. Nelson on the basis of other information. When read in context, however, Dr. Nelson's report makes clear that he received the information from the appellant himself. (Tr. 174).[3] Furthermore, during the hearing itself, the appellant made similar admissions to the administrative law judge concerning his ability to walk and climb stairs. (Tr. 83).[4] The administrative law judge did *not* refuse to consider appellant's credibility, but merely acknowledged that such consideration was unnecessary to the extent that the appellant admitted his ability to engage in certain types of activity. The administrative law judge was entitled to believe that even if appellant did in fact experience some pain, a light sedentary assembly job would no more exacerbate that pain than would his own admitted daily activities.

The case of *Adams* v. *Flemming*, 276 F.2d 901 (2d Cir. 1960), is in point. On facts similar to those at bar,

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[3] Dr. Nelson's report stated: The patient states he is 5'7" and weighs 125 pounds. He is able to sit for ½ hour, stand for 3 hours, walk approximately 4 blocks. The patient states he is unable to lift above 10 pounds but is able to use public transportation (Tr. 174).

[4] During the hearing, the administrative law judge asked:

Q. How far can you walk these days? A. I have to walk very slow, very slow. About 3 blocks.

Q. Can you climb steps? A. I can climb steps but they have to be very low. Now high.

Q. How many steps can you climb? A. About 6. (Tr. 83).

this Court noted that the claimant's daily routine seemed to be little different from the office work for which he was qualified. In affirming the determination of the Secretary, this Court stated:

> "Judicial notice can be taken of the fact that the human anatomy is subjected to many ills. There are undoubtedly millions of people suffering daily from some infirmity, ". . . None of these persons can be said to be unable to engage in any substantial gainful activity." 276 F.2d at 904.

The appellant also points to certain medical evidence in the record which allegedly establishes the severity of his pain. While he claims that there is "no contravening evidence", the record does not support such a conclusion. As Judge Bruchhausen noted in his District Court decision, the record is "replete" with evidence supporting the Secretary's findings. Much of that evidence is discussed in the administrative law judge's opinion.

The administrative law judge noted that an X-ray report by the Workmen's Compensation Board showed no evidence of any fracture or dislocation (Tr. 20); that one Workmen's Compensation Board physician found that the appellant would be able to resume work as of February 28, 1972, but was to avoid heavy lifting (Tr. 20); that another Board certified orthopedic surgeon found no scoliosis, deformity, atrophy or weakness (Tr. 21); and that no tenderness appeared at the sacroiliac (Tr. 21). Most significantly, the administrative law judge noted Dr. Nelson's statement that "there appears to be voluntary guarding of motion." (Tr. 21, 174). Of course, this observation would also bear on the appellant's credibility. Dr. Nelson reported that the appellant has "no impairment of sitting, standing or walking. He has no impairment of either fine or gross manipulation of the hands." (Tr. 175).

Finally, the record shows that none of the examining physicians placed any restrictions upon the appellant's activities, other than Dr. Nelson's warning that the appellant should not lift over 30 lbs. and should avoid repetitive bending or stooping (Tr. 175). In this respect, the present case is identical to *Franklin* v. *Secretary of HEW*, *supra*, where this Court upheld the Secretary's determination, stating that:

> It is significant, nevertheless, that, despite her claims of limited neck movement, stiffness, and pain, the only restriction that any of the various physicians whom she had consulted had placed upon her activity was one by one physician that she should be careful not to lift objects weighing over 25 pounds. 393 F.2d at 461.

It is also important to note that the "medical" evidence on which appellant relies to establish that he is enduring pain consists in large part of complaints of pain made by the appellant to the various examining physicians. Appellant's brief, pp. 10-11. Of course, these reports in no way establish that the appellant actually suffers from the pain of which he complains. They are simply records of the appellant's complaints. Further, the report of the Brooklyn Hospital was made shortly after the appellant's accident, at the time when it should be expected that pain would still be present. The administrative law judge was not required to believe that the pain noted in that report persisted at the time of the hearing.

In short, although the medical evidence conflicts in significant respects and although there might be room for disagreement as to the existence or severity of the appellant's pain, it cannot be said that there is no reasonable evidence to support the decision of the administrative law judge, whose duty it is to resolve such conflicts. *Gaultney* v. *Weinberger*, 505 F.2d 943 (5th Cir. 1974); *Sanders* v. *Weinberger*, *supra*.

## B. The Secretary considered the combined effect of appellant's impairments.

As argued in the appellant's brief, all complaints of a claimant must be considered together in determining his work capacity. *Gold* v. *Secretary of HEW*, *supra*. The appellant's contention that the Secretary did not follow this rule is completely unsubstantiated in the record. The administrative law judge explicitly acknowledged that it was his duty to determine ". . . whether any single impairment, *or combination of various impairments* . . ." (emphasis added) has rendered the claimant unable to engage in substantial gainful activity (Tr. 20).

Similarly, the Social Security Appeals Council consistently grouped the appellant's impairments together in considering his capacity for work, finding that the appellant "has no significant orthopedic or neurological disease or mental or emotional impairment" (Tr. 8). The Council specifically said that it has considered "the claimant's age, education, vocational background and residual functional capacity" in upholding the hearing examiner's finding (Tr. 8). Although the Appeals Council discussed the impairments individually for analytical purposes, this is not an indication that their effects were not considered cumulatively.

The appellant also enumerates various pieces of evidence which the administrative law judge allegedly failed to consider. Obviously, the judge's decision is not required to reiterate every piece of evidence that appears of record, but rather may summarize the major points upon which the judge bases his conclusions. The absence of any discussion of certain evidence indicates, at most, that the judge was not persuaded that such evidence was material to the outcome of the appellant's claim.

Further, the judge's opinion specifically considers many items which the appellant contends were ignored. Thus, while the appellant claims that no mention is made of the condition diagnosed as "diffuse fibromyositis of the back", the opinion specifically points to that ailment (Tr. 20). The appellant also maintains that the Appeals Council overlooked another condition called "epicondylitis of the elbow." While the Appeals Council concededly did not mention epicondylitis by name, its opinion makes clear that the entire record, including the comments of the administrative law judge, were considered.[5] Accordingly, since the administrative law judge referred to appellant's epicondylitis (Tr. 20), it can hardly be surmised that the Appeals Council did not, in fact, take appellant's elbow condition into consideration.

The other conditions which the appellant claims were ignored, such as low-back derangement, headache and lightheadedness, were contained in the reports of Doctors Burman and Guthrie (Tr. 204-206). Since both of these reports were made subsequent to the hearing they of course were not considered by the administrative law judge. However, the Appeals Council explicitly points out that both of these reports were "carefully considered" on review (Tr. 5). The record is therefore clear that the Secretary considered all the credible evidence in making his determination.

It is true that the Appeals Council's decision deals largely with the psychiatric reports alone, and does not mention the combined effect of the physical and mental impairments. Since these reports were not available to

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[5] The Appeals Council stated that it had ". . . carefully considered the entire record which was before the administrative law judge, his comments pertinent thereto, the arguments made, and the additional evidence which has been admitted into the record . . ." (Tr. 5).

the administrative law judge, the Appeals Council of course gave them special attention since they had not been considered before. If the appellant's attorney had wished a more explicit finding as to the combined effect of the mental and physical difficulties, he certainly had the opportunity to request it. The appellant carried the burden of establishing his disability with credible evidence. This Court should therefore not reverse the Secretary's findings on the grounds that he failed to consider the impairments in combination unless the appellant establishes such a failure on the record. *Beshears* v. *Celebrezze*, 338 F.2d 998 (5th Cir. 1964); *Lankford* v. *Weinberger*, 373 F. Supp. 1171 (E.D. Tenn. 1973), *aff'd.*, 497 F.2d 924 (6th Cir. 1974). In the instant case, there is no showing whatsoever that the combined effects of the appellant's impairments were not considered

## C. The Secretary's finding that there is other substantial work available in the national economy for a person with appellant's limitations is supported by substantial evidence.

In the present case the administrative law judge found that the appellant is unable to return to his former hard labor employment (Tr. 21). This fact does not establish a disability however, unless the appellant is also unable to engage in any other kind of substantial gainful work ". . . which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives. . ." 42 U.S.C. § 423(d)(2)(A).

The phrase "work which exists in the national economy" is defined as "work which exists in significant numbers either in the region where . . . [the claimant] . . . lives or in several regions of the country." 42 U.S.C. § 423(d)(2)(A). Once the claimant has shown that he is unable to resume his previous employment, the Sec-

retary has the burden of coming forward with evidence that other substantial work exists for a person with the claimant's impairments. *Meneses* v. *Secretary of HEW*, 442 F.2d 803 (D.C. Cir., 1971). Of course, the Secretary only need produce *some* evidence, and the ultimate burden of proof rests upon the claimant. *Black* v. *Richardson*, 356 F. Supp. 861 (D.S.C. 1973).

The Secretary sought to meet the burden of coming forward with evidence by the testimony of Benjamin H. Lipton, a vocational expert (Tr. 77). This type of testimony is customarily used in such proceedings and can itself serve as substantial evidence to support the Secretary's findings. *Kerner* v. *Celebrezze*, 340 F.2d 736 (2d Cir.), *cert. denied*, 382 U.S. 861 (1965); *Gardner* v. *Gunter*, 354 F.2d 755 (5th Cir. 1965).

The appellant urges that Mr. Lipton's testimony is insufficient because it was elicited through the use of a hypothetical question which allegedly did not accurately describe the appellant (Tr. 90-91). The record clearly shows, however, that the hypothetical *did* accurately describe the appellant's condition as the administrative law judge, after reviewing the evidence, believed it to be. It must be remembered that the administrative law judge had to consider the credibility of the appellant's testimony regarding his pain, and also the conflicts in the medical evidence concerning the injury, which it was his duty to resolve. The hypothetical listed the various activities of which the administrative law judge found the appellant to be capable. The judge was not required to include in his question impairments or pain which he did not believe to exist. In his very opinion, the judge found that the only types of jobs that Mr. Gonzalez could not perform were those involving repetitive bending or lifting (Tr. 21-23). Finally, it is important to note that the appellant's attorney made no objection to the phrasing of the question, which he evidently believed to be a fair assessment of the appellant's condition.

Giving due regard to the administrative law judge's discretion in making determination of fact, it is clear that the hypothetical was legitimate.

Finally, the appellant maintains that there is "no" evidence that the available jobs exist in substantial numbers. While Mr. Lipton was unable to give the exact numbers of "light" janitorial jobs available (Tr. 101), his testimony as to the availability of bench assembly jobs was specific and unequivocal (Tr. 91-98). When asked if there were jobs available for a person with the appellant's limitations, Mr. Lipton gave an unqualified "yes" answer (Tr. 91). As an example, Mr. Lipton testified that there were about 30,000 jobs in New York City involving the assembly of small parts (Tr. 97). This number was based upon statistics reported by the Department of Labor, and Mr. Lipton's own expert analysis (Tr. 97).

The appellant argues that Mr. Lipton was not able to name any specific jobs which a person with the appellant's limitations could perform. However, on the cross-examinination by the appellant's own attorney, Mr. Lipton did specify such jobs. Mr. Lipton answered affirmatively when asked whether there was one job which he could point to that he was sure the appellant could perform, considering his disability (Tr. 118). When asked to specify the jobs, Mr. Lipton answered "I've given you all the jobs of the assembly—of the assembly trainee" (Tr. 118).

This testimony is far from being "speculative and uncertain", as characterized by the appellant. In fact, the testimony is remarkably similar to that relied on in *Franklin* v. *Secretary of H.E.W.*, *supra*. In that case, this Court distinguished *Ber* v. *Celebrezze*, *supra*, upon which the appellant relies, stating:

> We note also that in *Ber*, we relied heavily upon the fact that there was nothing in the record in

> that case to indicate that claimant was qualified for any alternative employment to that of a sewing machine operator, whereas here the hearing examiner noted that appellant was qualified for many kinds of sedentary work and clerking jobs that do not require that one's head and neck remain in fixed positions for substantial periods of time. 393 F.2d at 642.

Since the record is replete with evidence that jobs exist in substantial numbers which the appellant can perform, the Secretary's finding must be affirmed.

## POINT II

### Since the appellant has not shown "good cause" as required by statute, he is not entitled to a remand

The appellant concedes that a remand is only available "for good cause shown" 42 U.S.C. § 405(g). Again, since the appellant was represented by counsel at the hearing, it was his duty to bring forth any and all evidence material to establishing a disability. The appellant maintains that ". . . no effort was made by the Secretary to obtain . . . [the] . . . records" relating to appellant's alleged tuberculosis. (Appellant's brief, p. 26). It is clear, however, that the Secretary was under no obligation to do so. Appellant seeks to excuse the failure of his former attorney to produce these records by speculating that he "possibly" felt the information was unnecessary. An equally plausible theory is that the prior attorney felt that tuberculosis could not be established. In any event, the Secretary was under no obligation to compensate for the inadequacies of counsel.

The appellant also requests a remand to consider his unsuccessful efforts to obtain employment. In determin-

ing a statutory disability, however, it is only the appellant's capability to perform jobs which exist in substantial numbers that is in issue. The statute specifically states that it does not matter ". . . whether a specific job vacancy exists. . ." 42 U.S.C. § 423(d)(2)(A). Since the existence of jobs in the national economy was established at the hearing, the appellant's later unsuccessful attempts to obtain employment are immaterial and certainly do not constitute grounds for a remand.

Finally, we submit that any additional information concerning the appellant's "psychiatric difficulties" does not warrant a remand since such evidence was specifically considered by the Appeals Council, which found that ". . . the claimant's emotional ability to relate to other people was not impaired nor was there indication of restriction of his daily activities." (Tr. 7). The Council noted that "[t]he claimant neither contends nor does the medical evidence establish, that a mental impairment has had any significant affect [sic] on his ability to work." (Tr. 7). The appellant now argues that a remand is necessary since the vocational expert did not consider the psychiatric reports when he testified concerning the various jobs the appellant could perform. The Council's opinion clearly finds, however, that no significant psychiatric impairment exists (Tr. 8). In the absence of such a finding, the new evidence could not affect the vocational expert's testimony. The administrative law judge certainly would not ask the expert to consider the effect of psychiatric impairments which were found not to exist.

## CONCLUSION

**For reasons set forth above, and upon the record below, the judgment of the United States District Court for the Eastern District of New York in this action should be affirmed.**

Dated: June 28, 1976

Respectfully submitted,

DAVID G. TRAGER,
*United States Attorney,*
*Eastern District of New York.*

PAUL B. BERGMAN,
J. CHRISTOPHER JENSEN,
*Assistant United States Attorneys,*
*Of Counsel.**

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* The United States Attorney's office wishes to acknowledge the invaluable assistance of Thomas C. Etter in the preparation of this brief. Mr. Etter is a third year law student at St. John's University School of Law.

# APPENDIX

PAGINATION AS IN ORIGINAL COPY

## Decision of Bruchhausen, *D. J.*

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

No. 75 C 582

February 18, 1976

FELIX ROJAS GONZALEZ,

*Plaintiff,*

*—against—*

SECRETARY OF HEALTH, EDUCATION AND WELFARE OF THE UNITED STATES,

*Defendant.*

Appearances:

JOHN C. GRAY, JR., ESQ.
Attorney for Plaintiff
By: YVONNE LEWIS, ESQ.
and TOBY GOLICK, ESQ.
Of Counsel

DAVID G. TRAGER, ESQ.
United States Attorney
Eastern District of New York
Attorney for Defendant
By: J. CHRISTOPHER JENSEN, ESQ.
Assistant U. S. Attorney
Of Counsel

BRUCHHAUSEN, *D. J.*

The parties move for an order, pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, for judgment on the pleadings. The plaintiff seeks, in the alternative, remanding the matter for the taking of additional evidence.

The proceedings indicate that the plaintiff applied for disability benefits on September 9, 1971, as a result of a back injury. Ex. 1. This application was denied on November 22, 1971. Ex. 3. The claimant requested and obtained a reconsideration of his claim, and on August 22, 1972, it was determined that the prior decision concerning non-disability was correct. Ex. 6.

Thereafter on September 24, 1973, the claimant together with counsel, a vocational expert, and an interpreter, appeared before one of the Secretary's authorized representative, an Administrative Law Judge, who conducted a full hearing, and on October 30, 1973, ruled that the claimant was not entitled to the period of disability and disability insurance benefits, pursuant to the applicable provisions of the Social Security Act. Thereupon the claimant on November 13, 1973 requested a review of the hearing officer's decision, which request was granted. In addition to the entire record, the Appeals Council sought and admitted additional medical evidence into the record, as indicated in its decision, dated March 28, 1975. In its decision, the Appeals Council ruled that the claimant was not entitled to a period of disability or to disability insurance benefits under the provisions of sections 216(i) and 223, respectively, of the Act, as amended. The hearing decision was, therefore, affirmed.

The plaintiff exhausted all administrative appeals and commenced this action, pursuant to 42 U.S.C.A. § 405(g), for a judicial review of the final decision of the Secretary of Health, Education and Welfare.

The sole issue presented is whether the Secretary's decision is supported by substantial evidence.

In Cutler v. Weinberger, 516 F.2d 1282 (1975) (Cir. 2), the court held in part at page 1285:

> "The general rule is that this court must sustain a final decision by the Secretary if it is supported by 'substantial evidence' on the record as a whole. See Gold v. Secretary of Health, Education and Welfare, 463 F.2d 38, 41 (2 Cir. 1972); Franklin v. Secretary of Health, Education and Welfare, 393 F.2d 640 (2 Cir. 1968); 42 U.S.C. § 405(g). * * *, this Circuit has observed that the Social Security Act is remedial or beneficent in purpose, and, therefore, to be 'broadly construed and liberally applied.' Gold v. Secretary of Health, Education and Welfare, supra, at 41, quoting from Haberman v. Finch, 418 F.2d 664, 667 (2 Cir. 1969). Consistent with this view of the Act, courts have not hesitated to remand for the taking of additional evidence, on good cause shown, where relevant, probative, and available evidence was either not before the Secretary or was not explicitly weighed and considered by him, although such consideration was necessary to a just determination of a claimant's application." (Cases cited).

In the case at bar, the record is replete with medical evidence, supporting the findings of the Secretary. In addition to the original records, the Appeals Council requested and received additional outside neurological, psychiatric, and psychological consultative examinations. All of these examinations of the plaintiff proved negative.

The court, mindful of the dictates in Cutler v. Weinberger, supra, after consideration of the record, arguments and applicable law, concludes that there was ample and substantial evidence to justify the administrative determination.

The motion of the defendant for judgment on the pleadings is granted, and the plaintiff's motion is denied.

It is so ordered.

Copies hereof will be forwarded to the attorneys for the parties.

WALTER BRUCHHAUSEN
Senior U. S. D. J.

★ U. S. Government Printing Office 1976-- 614—353—222

# AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

LYDIA FERNANDEZ, being duly sworn, says that on the 28th day of June, 1976, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, ~~a~~ two copies of government's brief and appendix of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

John C. Gray and Toby Golick, Esqs.
Brooklyn Legal Services Corp.
152 Court Street
Brooklyn, N. Y. 11201

Sworn to before me this
28th day of June, 1976

Olga S. Morgan

OLGA S. MORGAN
Notary Public, State of New York
No. 24-4501966
Qualified in Kings County
Commission expires March 30, 1977

Lydia Fernandez

LYDIA FERNANDEZ